IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 703

JACK ALLEN BARBER,

Petitioner,

—v.—

RAY H. PAGE, Warden,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF OF PETITIONER

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INDEX

SUBJECT INDEX

	Page
Additional Applicable Statute	1
Additional Statement of the Case	2
ARGUMENT IN REPLY:	
I. A Writ of Habeas Corpus Ad Testificandum Should Have Been Sought in Order to Afford Petitioner the Constitutional Right of Confrontation	3
II. *Pointer* v. *Texas* Is Not to Be Confined Narrowly	4
III. Parks' Inability to Waive Petitioner's Constitutional Rights and to Represent Petitioner Effectively Arises Not From Parks' Previous Relationship With Co-Defendant Woods, but From His Relationship With Woods Following Ostensible Withdrawal at the Preliminary Hearing	5
Conclusion	7

TABLE OF AUTHORITIES CITED

CASES:

Barber v. *Page*, 355 F.2d 171	2
Barber v. *State*, 388 P.2d 320	2
Brubaker v. *Dickson*, 310 F.2d 30 (9th Cir., 1962)	7
Burgett v. *Texas*, 389 U.S. 109 (1967)	4
Carbo v. *U. S.*, 364 U.S. 611	3
Fay v. *Noia*, 372 U.S. 391 (1962)	7
Henry v. *Mississippi*, 379 U.S. 443 (1965)	6

Page

Marchetti v. *U. S.*, No. 2, O.T. 1967, —— U.S. ——, 36 USLW 4143 8

Pointer v. *Texas*, 380 U.S. 400 (1965) 4

Smith v. *Illinois*, 158 O.T. 1967, —— U.S. ——, 36 USLW 4141 ..... 4, 8

Strand v. *Schmittroth*, 251 F.2d 590 (1957) 3

U. S. v. *McGaha* (E.D. Tenn., 1962), 205 F.Supp. 949 3

Wilson v. *Gray*, 345 F.2d 282 (9th Cir., 1965) 6

STATUTE:

28 U.S.C. 2241(c)(5) 3

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Additional Applicable Statute

In addition to the constitutional provisions and statute cited in Petitioner's opening brief, because of Respondent's statement (p. 22) of awareness of statutory authority for the release of a Federal prisoner to state officials for the purpose of having such prisoner testify in the trial of another accused, it is necessary to cite 28 U.S.C. 2241(c)(5):

> "(a) Writs of habeas corpus may granted by the Supreme Court, any justice thereof, the district courts

and any circuit judge within their respective jurisdictions.

• • • • •

"(c) The writ of habeas corpus shall not extend to a prisoner unless—

• • • • •

"(5) It is necessary to bring him into court to testify or for trial."

Additional Statement of the Case

The witness Co-Defendant Woods was not cross-examined by Mr. Parks, Petitioner's attorney at the trial, who, during the preliminary hearing, withdrew as Woods' attorney.[1] Respondent so implies in its Brief in this Court (page 2, last sentence of first full paragraph), and so conceded in the Court of Appeals. (*Barber* v. *Page,* 355 F.2d 171, at 172) The United States District Court for the Eastern District of Oklahoma so noted. (A. 52) For this reason, the quotation from the opinion of the Oklahoma Court of Criminal Appeals in *Barber* v. *State,* 388 P.2d 320 (A. 28-41) printed at page 3 of Respondent's brief, is inappropriate.

There is no basis in the record for the statement at page 15 of Respondent's brief that Parks was retained separately by Petitioner and all of his co-defendants.

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[1] Attention is called to a regrettable error in Petitioner's Brief, at page 3, in the last sentence of the first paragraph. The sentence should read: "Woods was not cross-examined by Parks but was *cross-examined* by a different attorney for another jointly accused" (A. 61). (Emphasis shows change from wrong word "represented".)

ARGUMENT IN REPLY

I.

A Writ of Habeas Corpus Ad Testificandum Should Have Been Sought in Order to Afford Petitioner the Constitutional Right of Confrontation.

In our opening Brief, we urged that the state has or should have a greater burden with respect to proving unavailability of a witness than a stipulation that the absent witness is in a federal penitentiary in a neighboring state. (Petitioner's Brief, page 15) We continued:

> "Cooperation between state and federal law enforcement officials is common knowledge."

Respondent says it is unaware of authority for the release of a Federal prisoner to State officials for the purpose of having such prisoner testify in the trial of another accused. (Respondent's Brief, page 22) The statutory authority is found in 28 U.S.C. 2241(c)(5), *supra*, pp. 1-2. A federal court has jurisdiction to issue the writ extraterritorially to the Warden of the Federal prison in another jurisdiction in a proper case. *U. S.* v. *McGaha* (E.D. Tenn., 1962), 205 F.Supp. 949. *Accord, Carbo* v. *U. S.*, 364 U.S. 611 (Writ of Habeas Corpus Ad Prosequendum) The cooperation, at least in respect of Writs of Habeas Corpus Ad Prosequendum, sometimes arises from consent of one sovereign to proceedings by the other. *Strand* v. *Schmittroth*, 251 F.2d 590 (1957)

II.

Pointer v. Texas Is Not to Be Confined Narrowly.

At page 6 of its Brief, Respondent suggests that *Pointer* v. *Texas,* 380 U.S. 400 (1965) should be limited to the facts of that particular case. Respondent states that, "This Court has, very probably, already so limited that decision • • • ." Neither *Burgett* v. *Texas,* 389 U.S. 109 (1967), nor *Smith* v. *Illinois,* 158 O.T. 1967, decided January 29, 1968, —— U.S. ——, 36 USLW 4141, so indicates. Indeed, as Judge Aldrich said in dissent in this case:

> "The right of confrontation, although but recently imposed upon the states, is an old and valuable right. Kirby v. United States, 1899, 174 U.S. 47. I do not take it that the extension by Pointer v. Texas, 1965, 380 U.S. 400, was only half-hearted; we must be guided fully by the Supreme Court decisions. The esteem in which the Court holds this right is illustrated by its recent case of Parker v. Gladden, —— U.S. ——, 12/12/6 . Cf. Brookhart v. Janis, 1966, 384 U.S. 1." (A. 62)

III.

Parks' Inability to Waive Petitioner's Constitutional Rights and to Represent Petitioner Effectively Arises Not From Parks' Previous Relationship With Co-Defendant Woods, but From His Relationship With Woods Following Ostensible Withdrawal at the Preliminary Hearing.

With candor, Oklahoma concedes, "There having apparently been a *previous* agreement made between the prosecution and Woods, the prosecution called Woods to testify at this (preliminary) hearing." (Emphasis supplied) (Respondent's Brief, page 2, first full paragraph) At the time of the "previous agreement" with the prosecution, Woods was represented by Parks. After advising Woods of his right to claim the privilege against self-incrimination, Parks was granted leave to withdraw as Woods' attorney. (A. 61) Thereafter, Parks failed to cross-examine Woods. Oklahoma contends this was a tactical decision. In so contending, Oklahoma overlooks the obvious practical difficulty Parks would have had in cross-examining Woods concerning the very "previous agreement" made with the prosecution by Parks, as attorney for Woods. Having failed to cross-examine Woods to ask him about the terms of the "previous agreement", Parks continued to represent Petitioner not only at the preliminary hearing, but at trial. Trial ended. Petitioner was found guilty. Commencing 15 days subsequent to the conclusion of Petitioner's trial, Parks appeared as Woods' counsel four times in three criminal cases against Woods in the United States District Court. (Appendix to Petitioner's opening Brief).

Respondent's Brief makes no mention of the events set forth above. Indeed, comment on the contents of Appendix A to Petitioner's opening Brief is conspicuously absent. Oklahoma urges that Parks "chose to be ineffective" at the preliminary hearing. (Respondent's Brief, page 19) The "choice to be ineffective" is characterized as "counsel's exercise of trial strategy and tactics". (Respondent's Brief, page 10). In so characterizing Parks' conduct of his representation of Petitioner, Respondent relies on *Wilson* v. *Gray*, 345 F.2d 282 (9th Cir., 1965)[2] Respondent overlooks the fact that in *Wilson* v. *Gray*, the Court of Appeals for the Ninth Circuit quoted the language of this Court from *Henry* v. *Mississippi*, 379 U.S. 443 (1965),[3] which appears at page 12 of Respondent's Brief, and it emphasized the words *"where the circumstances are exceptional"*. What could be more exceptional circumstances than:

(1) Ostensible withdrawal by Parks as counsel for Woods at the preliminary hearing in the state court system following the making of the "previous agreement" with the prosecution;

(2) Failure of Parks during the preliminary hearing to cross-examine Woods on behalf of Petitioner;

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[2] In *Wilson* v. *Gray* the Court points out, 345 F.2d at page 287, that of "seven short pages" of testimony at the preliminary hearing, only a minor part (reproduced in full in a footnote) was direct examination. The case is inapposite here, where there was no cross-examination—either in the presence of the Court or anywhere else. Moreover, *Wilson* v. *Gray* stands for case-by-case determination on the totality of the circumstances.

[3] This Court's disposition of *Henry* v. *Mississippi* is one of the alternatives suggested in the conclusion of Petitioner's opening Brief; i.e., remand to ascertain if there was waiver of the right of confrontation (Petitioner's Brief, page 20).

(3) Subsequent appearance by Parks as counsel for Woods in the federal court proceedings;

(4) In connection with the "offer of proof" in support of his objection to the admission of the transcript of the preliminary hearing stipulating that Woods was outside the jurisdiction of the Oklahoma Court.[4]

Conclusion

Oklahoma insists Petitioner is bound by Parks' judgment (Brief of Respondent, page 14), and that that judgment, "a choice to be ineffective" (Respondent's Brief, page 19) is "the considered choice of the petitioner." Under the standards prescribed in *Fay* v. *Noia,* 372 U.S. 391 (1962), it strains credibility to believe that an accused would choose to have his counsel be ineffective; it is inconceivable that an accused would choose to forego the vital constitutional right of confrontation and cross-examination. Can an attorney's choice to be ineffective vitiate the constitutional

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[4] At the time of appeal to the Oklahoma Court of Appeals, Parks recognized that this stipulation was harmful. In the brief on appeal, the following appears:

"* * * It should be pointed out here that there is no evidence in the record other than the offer of proof set out above, made by the defendant and denied by the Court, tending to show in any way why the witness, Charles Henry Woods, could not be present to testify in person and confront this defendant, as required by the Constitution and the Statutes of the State of Oklahoma" (A. 20).

"Determining whether the demands of due process were met in such a case as this requires a decision as to whether 'upon the whole course of the proceedings,' and in all the attending circumstances, there was a denial of fundamental fairness; it is inevitably a question of judgment and degree." *Brubaker* v. *Dickson,* 310 F.2d 30 (9th Cir., 1962) quoted in *Wilson* v. *Gray, supra.*

commands which are "organic living institutions whose significance is vital, not formal"? *Marchetti* v. *U. S.*, No. 2, O.T. 1967, decided January 29, 1968, —— U.S. ——, 36 USLW 4143. A choice to be ineffective is a "constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it." *Smith* v. *Illinois, supra.*

Respectfully submitted,

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March 20, 1968